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No. 682

In the Supreme Court of the United States

OCTOBER TERM, 1946

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, APPELLANT

v.

DUSTY RHODES, SHERIFF, TARRANT COUNTY, TEXAS, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THE COURT'S JURISDICTION UNDER SECTION 2 OF THE ACT OF AUGUST 24, 1937

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Probable jurisdiction of the above-entitled cause was noted by this Court on December 9, 1946 (R. 97). At the oral argument of the case on April 7, 1947, a question was raised as to this Court's jurisdiction under Section 2 of the Act of August 24, 1937, 50 Stat. 752, 28 U. S. C. 349a, and leave was granted for the filing of a memorandum on the issue.

The suggestion is that the Price Control Extension Act of 1946, effective July 25, 1946, does

not expressly prohibit a landlord who has obtained an eviction judgment during the period of suspension of controls (July 1–25, 1946) from evicting a tenant after July 25, 1946, without compliance with the Rent Regulation, but does so, if at all, through general language; that the constitutional question presented is thus an issue of the validity of the Act "as applied" by the Administrator in his Regulation to these particular landlords; that this is essentially an issue of "construction" rather than constitutionality; and that the case is, therefore, not within the purview of Section 2 of the Act of August 24, 1937.

(1) This suggestion finds no support in the language or legislative history of the Act. The pertinent language of Section 2 is as follows:

> In any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party, or in which the United States has intervened and become a party, and *in which the decision is against the constitutionality of any Act of Congress*, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party to such suit or proceeding upon application therefor or notice thereof within thirty days after the entry of a final or interlocutory judgment, decree or order * * *. [Italics supplied.]

Thus, no qualifications are stated in the statutory language.[1] The statute requires only that the "decision" be against constitutionality, and there is no doubt that such was the decision here (see main brief, pp. 5–6). There is no basis for an inference that when Congress used the term "constitutionality", it intended a meaning different from that which the term traditionally has had in this field of legislation, namely, "constitutionality" not only on the face of the enactment but also as applied to the particular circumstances. The evident policy of Section 2 was to permit a quick review by this Court of any "decision against the constitutionality" of an Act of Congress, and thus to minimize the effect of an erroneous decision which, so long as it stands unreversed, impedes the enforcement of a federal program, and may influence other courts as well.[2]

[1] And no qualifications have been suggested by the cases under this Section — though no case presenting the precise point involved here has been decided. This Court stated no qualifications when it analyzed the provisions of Section 2 of the 1937 Act in *I. L. G. W. U.* v. *Donnelly Garment Co.*, 304 U. S. 243, 249, as follows: "That section applies, *however the question of constitutionality may arise*, provided the United States is or has become a party *and the decision is against the validity of the Act.* That section does not require a court of three judges, and no provision is made for a direct appeal to this Court if the decision is in favor of the constitutionality of the Act." [Italics supplied.]

[2] We are advised that the decision of the district court in the instant case has delayed decision in numerous similar cases, pending the ruling of this Court.

This dangerous effect of a decision against constitutionality is not dependent upon whether the decision concerns the statute "on its face" or as applied. Every statute must be "applied"; and every statute has to be "construed". When Congress passed the 1937 Act, it was well aware that some of the major constitutional attacks upon federal legislation had been directed at statutes not only on their face but as applied and construed to important areas of activity, particularly, for example, in cases involving the application of broad statutory provisions like "affecting commerce". To exclude all such cases from Section 2 would mean that Congress had enacted an incomplete provision, incapable of bringing to this Court as speedily as possible cases in which a district court has refused on constitutional grounds to give effect to federal legislation.

The legislative history of the Act of August 24, 1937, lends support to the construction indicated by its language and policy. (1) Congressman Hatton Sumners, the sponsor of the bill in the House, observed at one point that it "gives the right of appeal directly to the Supreme Court in cases where the right to appeal would now be to the Circuit Court of Appeals"[8]—and the right to

[8] 81 Cong. Rec. 3272:

"Mr. CHANDLER. But I am speaking about this particular amendment, which seeks to give direct appeal in all suits in which the United States is a party, and I am simply

appeal to a circuit court of appeals on constitutional questions is of course unqualified by any "constitutionality as applied" doctrine such as is suggested here; (2) the district court's discretion, in a suit between private parties, to determine whether there was a "substantial" enough constitutional question to allow intervention by the Attorney General (who would have a consequent right of direct appeal) was eliminated in the Senate;[4] (3) the House Report on the bill referred

raising the point whether as to criminal cases it would be an error to provide that.

"Mr. SUMNERS of Texas. May I make this suggestion to my colleague? Of course, this would not attempt to give the right of appeal where the right to appeal does not now exist under the law; at least, that is our view. It gives the right of appeal directly to the Supreme Court in cases where the right to appeal would now be to the Circuit Court of Appeals."

[4] The House Bill (H. R. 2260, 75th Cong. 1st Sess.) provided in paragraph (a) that in any federal case where the United States was not a party and the constitutionality of a federal statute was drawn into question, the court having jurisdiction should certify such fact to the Attorney General if the Court was of the opinion "that a substantial ground exists for questioning the constitutionality of the statute." Paragraph (b) provided that the Attorney General could appeal to the Supreme Court, and such appeals were to take precedence "over cases in the Supreme Court in which a substantial question of constitutionality has not been drawn."

This limitation was eliminated in the bill passed by the Senate, which became law. Members of the Senate Committee explained that it was the intention to give discretion to the Attorney General himself whether to intervene (81 Cong. Rec. 8507–08). And it was provided in Section

to the right of direct appeal by the United States as a right to appeal "from *any* decision or order of a lower court which is adverse to the constitutionality of an act of Congress".[5] [Emphasis added.] While these are but fragments of legislative history, they confirm the absence of any legislative purpose to narrow the term "constitutionality" as used in the 1937 Act.

(2) Persuasive precedents exist under other statutes to support the Court's jurisdiction in this case. Thus, the same kind of contention (*i. e.*, that a decision on constitutionality of a statute "as applied" is not enough to bring into

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2 that, whether the United States is a party or has intervened and become a party, "appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like character."

[5] House Report No. 212, p. 2 (75th Cong., 1st Sess.): "The importance to the Nation of prompt determination by the court of last resort of disputed questions of the constitutionality of acts of the Congress requires no comment. It is provided by the committee amendment to this bill that the Attorney General in his discretion may appeal directly to the Supreme Court from any decision or order of a lower court which is adverse to the constitutionality of an act of Congress, and that such appeals shall have precedence over other cases in the Supreme Court."

The House Bill had referred in paragraph (c) to "any suit or proceeding in any court of the United States * * * in which the decision is against the constitutionality of any statute of the United States." Section 2 of the bill passed by the Senate, which became the law, used the same language (except for the phrase "any act of Congress" in place of "any statute of the United States").

play the statutory provisions for direct review by this Court) was rejected in cases under the statute which prior to 1925 permitted direct appeals from district courts where the constitutional validity of a federal statute was drawn into question.[6] Thus, in *Lipke* v. *Lederer,* 259 U. S. 557, where the attack was against a particular form of administrative enforcement of the National Prohibition Act, not specifically provided by statute, the Court overruled the contention "that the cause involves only questions of construction and, therefore, the appeal should be dismissed" (at pp. 559–560). In *Towne* v. *Eisner,* 245 U. S. 418, the district court had construed the Revenue Act reference to "income" as covering stock dividends, and upheld the statute as thus construed. This Court reversed unanimously, in an opinion by Mr. Justice Holmes. The opinion rejected the contention that there was no jurisdiction on direct appeal because the case turned on the construction of the statute.

[6] Section 5 of the Act of March 3, 1891, Section 238 of the Judicial Code prior to the 1925 amendment, read in pertinent part: "appeals or writs of error may be taken from the district courts * * * direct to the Supreme Court in the following cases: * * * In any case that involves the construction or application of the Constitution of the United States; in any case in which the *constitutionality of any law of the United States*, or the validity or construction of any treaty made under its authority, is *drawn in question*; [and] in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." [Italics supplied.]

The Court thought that the contention "that the statute as it is construed and administered is unconstitutional" gave it jurisdiction. In *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397, a statute imposed a percentage tax on gross receipts of sugar refining corporations, based on returns to be submitted; the plaintiff claimed the statute was inapplicable to him, and that in any event the Government in processing his returns should not have considered certain items as part of his gross receipts. The case went to the circuit court of appeals and then to this Court which said (192 U. S. at 400, 407): "One of the contentions of the plaintiff was that apart from its constitutionality, the act of 1898, properly construed, did not embrace the claims here in dispute, and therefore did not authorize the defendant to demand and collect the taxes here in question. * * * The plaintiff was entitled to bring it here directly from the Circuit Court or, at its election, to go to the Circuit Court of Appeals for a review of the whole case." And in *Billings* v. *United States,* 232 U. S. 261, where a federal tax on the use of foreign-built yachts was attacked for unconstitutionality, and various grounds were asserted for inapplicability of the tax, including the charge that it was intended to be prospective only, and not to apply to use during the year prior to the effective date of the law, jurisdiction on direct appeal was assumed by the Court without discussion.

(3) So, too, the same kind of contention was rejected in cases under Section 237 (a) of the Judicial Code, 28 U. S. C. 344 (a)[7] permitting review as of right, rather than review by certiorari, from the highest courts of the states, where the application of a state statute has been held not to conflict with the Federal Constitution. In the leading case of *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, the plaintiff had argued, in an action on a contract for sale and delivery of wheat, that a Kentucky statute imposing certain conditions for the doing of business upon foreign corporations was inapplicable to the transactions which were allegedly interstate commerce; and that as applied to such transactions the statute was invalid. This Court said, in allowing review by writ of error (at p. 289):

> that the statute was not claimed to be invalid *in toto* and for every purpose does not matter. A statute may be invalid as applied to one state of facts and yet valid as applied to another. * * * Besides, a litigant can be heard to question a statute's

[7] "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

> validity only when and so far as it is being or is about to be applied to his disadvantage. * * * Neither does it matter on what ground the court upheld and enforced the statute. * * *

And see *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265, in which this Court's jurisdiction by writ of error was upheld where a state taxing statute unquestionably valid as applied to intrastate commerce had been applied to oil moving in interstate commerce. Accord: *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277. In *Reconstruction Finance Corp.* v. *Beaver County*, 328 U. S. 204, the Court rejected objections to its jurisdiction in upholding the validity of a Pennsylvania "real property" tax statute "as applied" to certain machinery installed in an aircraft plant.[8] An administrative order of a state bureau applying a statute governing workmen's compensation was held to be a state "statute" for purposes of the jurisdictional provision, in *Sultan Ry. & Timber Co.* v. *Department of Labor and Industries*, 277 U. S. 135; and similar decisions have been made with respect to ordinances issued under general authority of state

[8] "The question presented on this appeal from the Supreme Court judgment is whether the Supreme Court's holding that this machinery is 'subject to' a local 'real property' tax means that the Pennsylvania tax statute, 72 Purdon's Pennsylvania Stat. (1936) 5020–201, *as applied* conflicts with § 10 of the Reconstruction Finance Corporation Act." [Italics supplied.]

statutes (*King Manufacturing Co.* v. *Augusta*, 277 U. S. 100; *Jamison* v. *Texas*, 318 U. S. 413) and with respect to an order of a land-grant state university defining the scope of compulsory military training under a state statute authorizing regulation of the scope of compulsory military training (*Hamilton* v. *Regents of University of California*, 293 U. S. 245). And in *Saltonstall* v. *Saltonstall*, 276 U. S. 260, where plaintiff in error sought "a determination that the Massachusetts statutes taxing inheritances did not affect the property passing to the beneficiaries under the trust, or, if applicable, were 'unconstitutional'" (p. 267), the Court said "the case is properly here on writ of error" and addressed itself to "the single objection discussed as a federal question by that court in its opinion, viz. that the statutes as applied deprive plaintiffs in error of their property without due process of law because retroactive as to them" (p. 268).

Such decisions as *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, are not to the contrary. They show that where the attack is upon administrative action *per se*, it does not meet the jurisdictional requirements. The Court indicated in the latter case that the attack must be on the statute or the statute "as applied". And it is "not enough that an appellant could have launched his attack upon the validity of the statute itself as

applied; if he has failed to do so we are without jurisdiction over the appeal" (at pp. 650–651).[9]

(4) Under the general, three-judge court statutes (Section 266 of the Judicial Code, 28 U. S. C. 380;[10] and Section 3 of the Act of August

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[9] See also *Charleston Federal S. & L. Assn.* v. *Alderson*, 324 U. S. 182, 185–186:

"Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court. * * * But it does not appear from the opinion of the Supreme Court of Appeals that the federal question was presented to or considered by that court. While the opinion intimates that appellants' objection was made to the *administration* of the statute, it nowhere indicates that they contended that, *as applied*, the statute was invalid as repugnant to the federal Constitution". [Italics supplied.]

[10] "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any office of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such

24, 1937, 28 U. S. C. 380a),[11] this Court has more than once emphasized that the disruption of normal judicial procedure and the "severe burden" on the judicial system caused by the convocation of a three-judge court justify a more narrow application of those statutes than their language may suggest (see *Ex parte Collins*, 277 U. S. 565; *Phillips* v. *United States*, 312 U. S. 246). Notwithstanding this consideration, the decisions under Section 266 do not disclose any significant departure from the consistent trend of judicial construction in this field.

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application * * * An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. * * * The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

[11] "No interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by a circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge. * * * An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case."

In *City of Cleveland* v. *United States*, 323 U. S. 329, the Court held that Section 266 of the Judicial Code, requiring a three-judge court and permitting a direct appeal, was applicable to a suit by the United States to restrain certain local taxing officials from applying Ohio tax laws to the property in certain United States Housing projects. The state laws in question were the provisions of the Ohio General Code, Sections 5328 and 5625–3 that "all property in this state shall be subject to taxation, except only such as may be expressly exempted therefrom," and that "the taxing authority of each subdivision is hereby authorized to levy taxes annually * * * on the real and personal property within the subdivision." The local officials had applied these laws to the housing property in question; it was the issue of the validity of these laws only as thus construed and applied which was held to make Section 266 of the Judicial Code applicable. And in *Ex parte Bransford*, 310 U. S. 354, 361 the Court observed that "it is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not re-

quire a three-judge court" [12] In *Phillips* v. *United States, supra,* as well, it appeared that the complaint had not attacked the statute as applied, but rather the executive action itself (at p. 252). See generally *Query* v. *United States,* 316 U. S. 486, 490.

(5) There is a further consideration, arising out of the particular structure of the Emergency Price Control Act, which rebuts the suggestion that the issue of constitutionality of the Act as applied is insufficient to make applicable Section 2 of the 1937 Act. The suggestion was based on the assumption that it was only the Act "as applied" through the prohibitions of the Regulation that created the constitutional issue. Insofar as this assumes that the prohibitions of the Act are less specifically aimed at the appellees than are the prohibitions of the Regulation, it is erroneous. The Regulation was officially interpreted on July 25, 1946 to apply to the precise situation involved here,[13] but this does not mean that the regulation

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[12] The Court's later reference (at 361) to *Ex parte Collins,* 277 U. S. 565, for the proposition that "§ 266 is inapplicable unless the action complained of is directly attributable to the statute" is to be read with the Court's subsequent reference to the *Collins* case in *City of Cleveland* v. *United States, supra.* In the latter case, the *Collins* case was distinguished as holding that an injunctive attack upon purely local municipal action "on behalf of the locality" was not within Section 266.

[13] See main brief, pp. 10–11. Thus, the fact that the word "judgment" is not included in the Section 6 (a) clause, "regardless of any contract, lease, agreement or obligation heretofore or hereafter entered into" evidences no intention to

was more specifically applicable than the Act. For the Act in Section 4 (a) specifically incorporates the prohibitions of the regulations. That section provides: "It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person * * * to do or omit to do any act, in violation of any regulation or order under section 2 * * *."

* * * * * *

In summary, there is no sound reason for supposing that the language of Section 2 of the 1937 Act means anything different from what it plainly says: that where the "decision is against the constitutionality of any Act of Congress" (and the United States or an officer thereof is a party), there is a right of direct appeal to this Court. Consideration of the legislative history, and of the decisions under other analogous statutes, not only fails to compel a reading into the unqualified language of Section 2 of a qualification of the kind which has been suggested, but rather gives affirmative support to the jurisdiction of the Court in this case.

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exclude judgments. The listing is to be regarded as illustrative rather than exclusive. Cf. *Ford* v. *United States*, 273 U. S. 593, 612; *Phipps* v. *Commissioner of Internal Revenue*, 91 F. 2d 627, 629 (C. C. A. 10), certiorari denied, 302 U. S. 742.

CONCLUSION

In view of the foregoing, it is submitted that this Court has jurisdiction of this appeal under Section 2 of the Act of August 24, 1937 (50 Stat. 752, 28 U. S. C. 349a).

Respectfully submitted.

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APRIL 23, 1947.

U. S. GOVERNMENT PRINTING OFFICE 1947

SUPREME COURT OF THE UNITED STATES

No. 682.—October Term, 1946.

Philip B. Fleming, Temporary Controls Administrator, *v.* Dusty Rhodes, Sheriff, Tarrant County, Texas, et al.	On Appeal from the District Court of the United States for the Northern District of Texas.

[April 28, 1947.]

Mr. Justice Reed delivered the opinion of the Court.

This appeal is from an interlocutory order of the District Court of the United States for the Northern District of Texas denying preliminary injunctions. Appellant's predecessor sued certain landlord appellees and the Sheriff and a constable of Tarrant County, Texas, in that United States district court for an injunction to stop eviction of tenants under state judgments that were recovered by the landlords in suits for restitution of leased property.[1] The state suits were filed by the landlords without the certificates required by the Rent Regulations for Housing to maintain such actions. 8 F. R. 7322; 10 F. R. 11666; 11 F. R. 5824, 8106. The state judgments were entered after June 30, 1946, the termination date of the Emergency Price Control Act, and before July 25, 1946, the date of the approval by the President of the Price Control Extension Act. As there was no federal price control statute during this period, these judgments will be treated as valid when granted.

The decision of the district court, denying the motion as to the landlords and directing the entry of the order, was

[1] Jurisdiction of suits for such injunctions is conferred upon the district courts of the United States by § 205 of the Emergency Price Control Act of 1942, 56 Stat. 23, 58 Stat. 632, 59 Stat. 306, and the Price Control Extension Act of July 25, 1946, Pub. Law No. 548, 79th Cong., 2d Sess.

based on the unconstitutionality, as applied to these state judgments, of that portion of § 18 of the Price Control Extension Act of July 25, 1946, that declared, "The provisions of this Act shall take effect as of June 30, 1946, . . ." [2] This provision the Court thought was unconstitutional (1) because the words affected the state judgments retroactively by bringing them under the Extension Act [3] and (2) because the vested rights, created by the prior judgments in the landlords to obtain restitution of their leased properties, could not be destroyed by subsequent legislation. Apparently it was felt that the due process clause of the Fifth Amendment forbade such regulation of the incidents of judgments. The question is raised as to whether the Act of August 24, 1937, 50 Stat. 751, confers power upon this Court to review, on direct appeal, a ruling against the constitutionality of an act of Congress when the ruling of unconstitutionality is made in the application of the statute to a particular circumstance, as in this appeal, rather than upon the challenged statute as a whole. A reading of the first three sections of the act convinces us that Congress granted litigants in courts of the United States a direct appeal to this Court from decisions against the constitutionality of any act of Congress as applied in the pending litigation.

The first section only authorizes the intervention of the United States in private litigation, "whenever the constitutionality of any Act of Congress affecting the public

[2] Price Control Extension Act of July 25, 1946, *supra*.

[3] As this opinion relies upon the validity under the price control acts of the prohibition of future eviction of tenants in § 6 of the Rent Regulation for Housing, 8 F. R. 7322; 10 F. R. 11666; 11 F. R. 5824, 8106, it is unnecessary to consider further whether the mere inclusion of these past judgments within the reach of the price control legislation, by advancing the effective date of the act, is constitutional. Compare *Blodgett* v. *Holden*, 275 U. S. 142, 146, and *Untermeyer* v. *Anderson*, 276 U. S. 440, 445, with *United States* v. *Hudson*, 299 U. S. 498.

interest is drawn in question."[4] It has nothing to do with appeals. The second section allows an appeal to this Court from a final or interlocutory order only when the United States is a party, through the preceding § 1 or originally; and the decision is against the constitutionality of the federal law. It provides for expedition in our determination of the appeal. Section three relates to the allowance or refusal of injunctions staying acts of Congress in whole or in part on the ground of repugnancy to the Constitution, and requires a three-judge court, expedition in determination and notice to the United States. The specific provision for prompt review of judgments granting or denying "in whole or in part" such an injunction is limited to applications for stays of acts of Congress because of their unconstitutionality. Thus the constitutionality of federal acts comes to us by direct appeal, under the Act of August 24, 1937, only when the United States is a party to the litigation below or an injunction is sought. This enables the United States to exercise large discretion, by its determination as to whether or not to intervene, as to what cases are reviewable directly in this Court.[5] The Congress intended prompt review of the constitutionality of federal acts.[6] Since § 1 allows

[4] The last three words were construed in *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 288, to allow appeals under Judicial Code § 237 to this Court from final judgments of state courts of last resort upholding the validity of state statutes against a challenge to their application to particular circumstances because of their repugnance to federal law. This was a settled construction for the words. See *Kepner* v. *United States*, 195 U. S. 100, 124.

[5] *Garment Workers* v. *Donnelly Co.*, 304 U. S. 243, 249–50.

[6] H. Rep. No. 212, 75th Cong., 1st Sess., p. 2:

"The importance to the Nation of prompt determination by the court of last resort of disputed questions of the constitutionality of acts of the Congress requires no comment."

S. Rep. No. 963, 75th Cong., 1st Sess., pp. 3–4:

"The United States is not excluded by the principle thus stated, from drawing the judicial power to its proper assistance either as an

intervention when the constitutionality of an act is "drawn in question" and § 2 allows appeal after intervention, it follows that there is an appeal from an order that invalidates, as unconstitutional, a statute as applied. To limit the generality of the language of § 2 of the Act of August 24, 1937, to cases that involved only the constitutionality as a whole of the challenged statutes might seriously impair prompt determinations of matters of great public interest. Litigants may challenge the constitutionality of a statute only in so far as it affects them.[7] We hold that jurisdiction of the appeal from the challenged order is conferred upon this Court by 28 U. S. C. § 349a.

The Court was also of the view that § 265 of the Judicial Code barred any injunction against the state officials.

The appellant sought injunctions against future eviction of these tenants through writs of restitution or other process by which eviction might be consummated. Sections 2 (d), 4 (a) and 205 (a) of the Emergency Price Control Act of 1942, as amended, and Rent Regulation § 6 (a), set out below.[8] Such an injunction is in accord with the administrative Interpretations of

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original party, or as an intervenor, when, in private litigation, decision of the constitutional question may affect the public at large, may be in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes a duty to all the citizens of securing to them their common rights."

[7] *Blackmer* v. *United States*, 284 U. S. 421, 442; *Virginian R. Co.* v. *Federation*, 300 U. S. 515, 558; *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 513.

[8] Emergency Price Control Act of 1942, 56 Stat. 23, 58 Stat. 632, 59 Stat. 306:

Section 2 (d). "Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, . . . regulate or prohibit . . . renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which

the Rent Regulation.[9] The properties involved in this litigation were defense-area housing accommodations.

in his judgment are equivalent to or are likely to result in . . . rent increases, . . . inconsistent with the purposes of this Act."

Section 4 (a). "It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to . . . do or omit to do any act, in violation of any regulation or order under section 2, . . . or to offer, solicit, attempt, or agree to do any of the foregoing."

Section 205 (a). "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

Rent Regulation for Housing, 8 F. R. 7322, 10 F. R. 11666; 11 F. R. 5824, 8106:

"Section 6. "*Removal of tenant—(a) Restrictions on removal of tenant.* So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodations, by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant has no lease or that his lease or other rental agreement has expired or otherwise terminated, and regardless of any contract, lease, agreement or obligation heretofore or hereafter entered into which provides for entry of judgment upon the tenant's confession for breach of the covenants thereof or which otherwise provides contrary hereto, . . ."

[9] Pike & Fischer, OPA Service, Rent, Interpretations of the Rent Regulation for Housing, § 6–VI, issued July 25, 1946:

"(a) Interpretation 6–VI. *Evictions Pending On July 25, 1946.*

"The Emergency Price Control Act of 1942, as amended, on July 25, 1946, was extended by striking out 'June 30, 1946' and substituting 'June 30, 1947,' as the expiration date of the Act. Section 18 provides that the provisions of the Act shall take effect as of June 30, 1946. In this section a savings clause was inserted for the protection of persons who had acted contrary to the regulation during the interim period between June 30, 1946, and July 25, 1946. This savings clause pro-

There is no suggestion that the heretofore referred to sections of the price control acts and § 6 of the Rent Regulations for Housing do not authorize these legal proceedings. The constitutionality of the price control acts, generally considered, is unquestioned. *Bowles* v. *Willingham*, 321 U. S. 503. The sole inquiry for us, at this point, is whether it was erroneous for the district court to refuse to allow the temporary injunction, because to do so would invade the constitutional right of the landlord appellees to retain the fruits of their "vested rights" in the valid judgments.

As the appellant is undertaking to enjoin future eviction of the tenants or lessees, our consideration is not affected by the proviso of § 18 of the Extension Act, set out in the margin.[10] The retroactive provision of § 18, quoted above at note 2, is inapposite for the same reason. It is immaterial whether the state judgments were obtained before or after the effective date of the Extension Act. The effort of the appellant is to enjoin future proceedings for eviction after the acquisition by the landlord appellees through valid judgments of what the district court characterized as "vested rights." Federal regulation of future

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vides that no act or transaction occurring between said dates shall be deemed a violation. As a result any eviction which occurred during the interim period was not a violation of the Act or regulation. By reason of this the tenant who has been in fact evicted during this interim period receives no protection. If, however, he is in possession on July 25, 1946, he is entitled to the protection of the eviction provisions of the regulation and it is a violation of the regulation for the landlord on or after that date to attempt to evict by court process or otherwise except in accordance with the provisions of Section 6 of the regulation."

[10] "*Provided further*, That no act or transaction, or omission or failure to act, occurring subsequent to June 30, 1946, and prior to the date of enactment of this Act shall be deemed to be a violation of the Emergency Price Control Act of 1942, as amended, or the Stabilization Act of 1942, as amended, or of any regulation, order, price schedule, or requirement under either of such Acts: . . ."

action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts. Were it otherwise the paramount powers of Congress could be nullified by "prophetic discernment." [11] The rights acquired by judgments have no different standing.[12] The protection of housing accommodations in defense-areas through the price control acts may be accomplished by the appellant notwithstanding these prior judgments. The preliminary injunctions should have been granted.

Only a word need be said as to the contention that § 265 of the Judicial Code forbids an injunction against the execution of state judgments by state officers.[13] A contention was made before this Court in similar cases last term that § 265 forbade a federal injunction to stay such proceedings in any court of a state. The argument was not accepted. We thought that § 205 (a) of the Emergency Price Control Act of 1942 created an exception to § 265.[14] No spe-

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[11] *Sproles* v. *Binford*, 286 U. S. 374, 391; *Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467; *Philadelphia, B. & W. R. Co.* v. *Schubert*, 224 U. S. 603; *Calhoun* v. *Massie*, 253 U. S. 170; *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 303–11; *Guaranty Trust Co.* v. *Henwood*, 307 U. S. 247, 259.

[12] *Wright* v. *Union Central Ins. Co.*, 304 U. S. 502, 509; *Paramino Lumber Co.* v. *Marshall*, 309 U. S. 370.

[13] Judicial Code § 265:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

[14] *Porter* v. *Lee*, 66 S. C. R. 1096; *Porter* v. *Dicken*, 66 S. C. R. 1094; *Lowles* v. *Willingham*, 321 U. S. 503, 510.

cific mention was made in these opinions as to whether state officers who were parties in the case could be enjoined. However, we do not see any ground, under § 265 of the Judicial Code, to differentiate as to stays against a sheriff or a constable or stays against the parties to the litigation. We think the District Court had power to stay the sheriff and constable.

Judgment reversed.

SUPREME COURT OF THE UNITED STATES

No. 682.—October Term, 1946.

Philip B. Fleming, Temporary Controls Administrator, *v.* Dusty Rhodes, Sheriff, Tarrant County, Texas, et al.	On Appeal from the District Court of the United States for the Northern District of Texas.

[April 28, 1947.]

Mr. Justice Frankfurter, dissenting.

In considering the scope of our appellate jurisdiction, great weight should be given to the strong policy of the Congress, ever since the Judiciary Act of 1891, to keep the docket of this Court within manageable proportions for the wise disposition of causes by the ultimate judicial tribunal. That consideration applies also to the few Acts, passed since the creation of the circuit courts of appeals, which allow cases to come here directly from the district court where issues of great public importance, such as the constitutionality of legislation, are at stake.

In *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, this Court gave an expansive content to review, as a matter of right, of State court judgments where is drawn in question "the validity of a statute." Our jurisdiction was held to cover review of a finding of unconstitutionality in the application of a statute to a particular situation, though the statute is otherwise left in full force and effect. While, for the reasons set forth in the dissent of Mr. Justice Brandeis, I have never been reconciled to the soundness of that decision, I accept it. But I do not feel obliged to extend its scope beyond its requirements.

There is an important difference between review of State court decisions and decisions of the district courts. The latter are subject to review as a matter of course by

the circuit courts of appeals. They are not dependent on review by grace through *certiorari*, as would be comparable State decisions except for the *Dahnke-Walker* doctrine. I do not feel myself required by the Act of August 24, 1937, to hold that direct appeal lies to this Court whenever a district court finds unconstitutional an application of a statute to the circumstances of a particular case. It is one thing not to allow final determination of the fate of a federal statute to be delayed until a decision of a district court can go through a circuit court of appeals and then reach this Court. It is quite another thing to bring here directly from a district court every decision indicating unconstitutionality in application, no matter how restricted its incidence. Of course this does not mean that direct review of district court decisions by this Court would be available only for cases that involve "the constitutionality as a whole" of a challenged statute. The Act of 1937 refers explicitly to invalidation "in whole or in part." Although this is made explicit in § 3 of the Act, the scope of direct review here, on the score of unconstitutionality, ought not to be different under different sections of this Act. A direct appeal is called for only when a district court strikes down, in whole or in part, that which Congress has unequivocally written. It is unwarranted when all that is in issue is whether the allowable scope of what Congress has written excludes a particular situation.

The immediate case gives point to these general observations. The incidents of a judgment are not the same in all the States. The effect of this Act upon judgments in the different States may thus involve consideration of the procedure of a particular State. These are hardly questions of the kind which led to the authorization, by the Act of August 24, 1937, of direct review where a district court's decision "is against the constitutionality of any Act of Congress." 50 Stat. 751, 752.

Nor should it be decisive of this Court's exceptional jurisdiction on direct appeal from the district courts that the Government is the litigant. Like other litigants the Government at times attaches importance to a particular case out of all proportion to the more comprehensive factors that should control this Court's jurisdiction. We cannot be blind to the fact that review here is sometimes pressed in response to commendable administrative earnestness which fails, however, to take fully into account the demands of this Court's business. Moreover, it was not the interest of the Government as such which moved Congress to grant direct appeals from the district courts. By the Judiciary Act of 1925 Congress narrowly confined direct review here of district court decisions regardless of the character of the litigant, and the extension of such review by the Act of 1937 should be strictly confined.

I would dismiss this appeal and remand the case to the Circuit Court of Appeals. See *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386, 392, and *Phillips* v. *United States*, 312 U. S. 246, 254.